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IN PURSUIT OF FINANCIAL JUSTICE: LOCAL AFRICAN COMMUNITIES' QUEST FOR LEGAL REDRESS AGAINST BUSINESS- RELATED HUMAN RIGHTS ABUSES

Laila Abdul Latif

Abstract: Mining corporations in Africa stand accused of violating human rights. This article gives a voice to the plight suffered by local African communities in accessing justice to remedy the violation of their human rights as a result of the business activities of mining corporations. It focuses specifically on the right to access justice in order to ask whether the affected communities get a fair and effective share of financial remedies to mitigate against the violation of their rights to health, clean environment and property. It examines two separate and independent avenues through which local communities access justice and asks which of the two, judicial or non-judicial approaches, guarantee these local communities a right to be heard and a recourse to financial remedies.

Keywords: *local communities, mining corporations, human rights violations, access to justice, financial remedies*

Introduction

The African continent is rich in resources. Its extractives sector is the subject of much policy, law and academic engagement. Policymakers, legislative drafters, the private sector and scholars have extensively engaged in analysing the potential of the mining, oil, gas and natural resource sectors. On the one hand, deliberations are centred on the revenue generating ability of the extractives sector (IMF 2011; Sigam and Garcia 2012; Shafaie 2015). On the other, there are the tax abuses and business-related human rights violations committed by corporations exploring, extracting and processing the raw materials and minerals (OECD 2015; Ndikumana 2016). This article aims to only focus on the relevant academic discourse. It does not seek to contribute

towards the discourse on the financial gains or tax evasion practices rampant within the extractives sector, but to narrow its scope to Africa's forgotten and most valuable resource – the local communities.

In doing so, the article utilises the descriptive and explanatory methods of inquiry into reviewing and analysing judicial and non-judicial cases through which these local communities have tried to seek financial compensation against the violation of their human rights. In addition, the article seeks to establish the different avenues of dispute resolution that local communities can access, also assessing their effectiveness. Its theoretical framework is guided by human rights that emphasise a government's and third parties' duty to *respect, protect and fulfil* human rights (Craven 1995; Sepulveda 2003). Within this framework, the right to property and the right to have access to justice and remedy provide the pillars upon which the article conducts its inquiry. Thus, the next section begins by setting out the theoretical approach of this article and points out the limited academic engagement with the question of access to justice for business-related human rights violations. The article then moves on to provide a description of the human rights violated by mining companies. Next, it examines several African countries discussing whether these avenues facilitate access to justice and financial remedies. The article then concludes by giving recommendations for improving non-judicial approaches to solving community grievances.

Theory and Literature Informing the Rationale to Address Business- Related Human Rights Violations

Theoretical Approach and Literature Review

Access to justice is a right that is recognised under Articles 7 and 8 of the Universal Declaration of Human Rights (UDHR) and Articles 2, 14 and 26 of the International Covenant on Civil and Political Rights (ICCPR). These two core instruments regulating access to justice state that everyone has the right to an effective remedy against violations of fundamental rights. Relatedly, the UDHR under Article 17 recognises the right to own property. Regrettably, however, neither the ICCPR nor the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain a direct counterpart to Article 17 of the

UDHR. Without this subsequent protection of the right to property under the international human rights framework, local communities, in particular in Africa, have been left vulnerable to exploitation. The mining sector has reinforced the vulnerability of the local communities by locking them out and impeding their access to justice and seeking remedies against the corporation's business-related human rights violations.

Human rights are given effect through the law. Remedies are made available, or should be made available, through national law. In the context of African countries, the right to access to justice and the right to property are constitutionally protected. Yet, the justifiability of these two rights in the context of the mining sector and its business-related human rights violations against local communities has not been sufficiently addressed. On the one hand, there is the damage caused to the land and environment as a result of mining which directly or indirectly interferes with the local community's ownership of such land and its right to a clean and healthy environment. On the other hand, there are difficulties in accessing justice as an avenue to address such violations. Scholarship in addressing these twin issues has been scarce. Instead, the academic literature has focused on the indirect impact of mining activities that have resulted in the poor health and well-being of local communities (Hresc et al. 2018); failure to redistribute mining company's revenue generation to benefit local communities (Rawashdeh et al. 2016); improving local communities engagement in developing sustainable mining activities (Que et al. 2018); and corruption within the mining sector that results in the exploitation of local communities (As'ad 2017). The discourse on access to justice by local communities whose human rights have been violated, specifically their property rights, and the interrelated right to health and a clean and healthy environment, have not been examined through a qualitative analysis of data sourced out of judicial and non-judicial entities.

The commitment of States to *respect, protect and fulfil* the human rights of local communities that are affected by activities within the mining sector needs to be conceptually addressed. Research on human rights violations takes a variety of forms. This usually manifests itself in law and court judgements that focus on examining interference with the enjoyment of rights and protecting them (Smith 2018). Such court

cases have not been examined from the perspective of assessing whether local communities are able to effectively access justice in the first place before seeking to vindicate the violation of their human rights. This then leads to the following questions: What does access to justice in the context of local communities against business-related human rights violations actually mean? Is access to justice only made available through the judicial process? Or do non-judicial avenues also provide and promote the right to access justice? Before these questions can be answered a description of business-related human rights violations of local communities is necessary to justify the need to access justice.

Description of the Human Rights Violated by Mining Companies

The argument put forward here is that the nature of politics and foreign direct investment is such that in promoting a liberal capitalistic market, certain abuses go unchecked and are even overlooked by the State under obligation to *respect, protect and fulfil* human rights. Such has been the case in particular with mining companies whose activities resulted in the social displacement of local communities. These communities have had their homes destroyed, their land and means of livelihood lost, culminating in gross violations of human rights (SADC Report 2017: 5). A plethora of examples from Africa corroborates this assertion.

In Botswana, for example, the San, or Bushmen, were forced to leave their ancestral homes in the Central Kalahari Game Reserve, “*allegedly to open the park to diamond mining*” (SADC Report 2017: 5). In Ethiopia, the government embarked on a “vigilization” policy aimed to forcefully displace the people of Gambella from their ancestral home to pave the way for corporate and industrial farming, a move that has resulted in gross violations of human rights (Human Rights Watch 2012). In Nigeria, oil exploration has turned its Ogoni area into a wasteland: lands, streams and creeks are totally and continually polluted; the atmosphere has been poisoned, charged as it is with hydrocarbon vapours, methane, carbon monoxide, carbon dioxide and soot emitted by gas which has been flared 24 hours a day for 33 years in very close proximity to human habitation. Acid rain, oil

spillages and oil blowouts have devastated Ogoni territory (Amnesty International 2005). These are only a few of the devastating effects on property rights violations and clean environment.

While the mining industry can bring significant social, economic, political and environmental changes to the regions in which they operate, their practices can also lead to conflict between the corporation and local communities. Corporations can be involved in human rights abuses in many different ways; because of the adverse impacts they may cause or contribute to through their activities, or by virtue of their business relations (Zerk 2014: 16–30). Hence, ensuring the legal and political accountability of corporations and access to justice for effective financial remedy for communities affected by such abuses is a vital part of a State's duty to protect against business-related human rights abuses (A/HRC/17/31).

In the next sections this article shows how at present, accountability and access to remedy in such cases is often elusive in the African context. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, corporations in Africa's extractive sector are seldom the subject of law enforcement and criminal sanctions (Mailey 2015). Under such circumstances, one has to ask what value access to justice has for local communities? This question will be unpacked below.

Human rights violations caused by business activities give rise to causes of action in many jurisdictions, yet community claims often fail to proceed to judgment and, where a remedy is obtained, it frequently does not meet the international standard of "adequate, effective and prompt reparation for harm suffered" (UN Resolution 60/147). Business-related human rights abuses that impact local communities usually occur in the contexts discussed below. The aim here is to justify the value of access to justice for local communities.

Access to Justice as a Value for Local African Communities

Displacement of communities from their land, destruction of forests, loss of livelihood and indigenous rights

Surface mining usually requires the displacement of farmers from their land. In Ghana, for example, cocoa is the major cash crop for small-scale farmer communities and in order to pave way for mining, farms have been destroyed without the consent of the farmers. As a result, affected farmers have become impoverished and are unable to send their children to school, pay medical bills and invest in a new farm (Twerefou and Tutu 2015; Ayitey et al 2011). Mining activities often involve the destruction of forests which provide communities with food or fire wood. This further poses a severe threat to their right to food, health and education (Twerefou and Tutu 2015).

Although mining corporations can potentially provide important economic benefits for catchment communities, the significant amount of land and other livelihood resources they appropriate can also cause severe community dislocation and hinder local development (Fanthorpe and Maconachie 2010: 251–272). In many rural stretches of West Africa, for example, communities are often guided by a strong sense of indigenous rights over natural resources, which may be deeply connected to their identity and are characterised by a firm sense of local entitlement, all of which can lead to a resentment of outsiders who exploit local resources for profit (Fanthorpe and Maconachie 2010: 251–272). Conflict at the community level may ensue over “the control of space, the governance of territory, access to land and water resources, the defence of human and citizenship rights, and dissatisfaction over the distribution of mineral rents” (Bebbington et al. 2008: 893).

The loss of livelihood resources associated with large-scale open-pit mines are particularly damaging to communities because they demand significant quantities of energy to operate. As Bebbington et al. (2008: 893) further note, mine development is often integrated with the construction of dams, hydroelectric plants, or other sources of energy, which can intensify existing competition over land, water, and energy. In response to perceptions of accumulation by dispossession, local communities may therefore mobilise around demands for distributive justice, “a more equitable distribution of the benefits deriving from the exploitation of natural resources” (Perreault 2006: 154). This may take the form of demanding financial remedies such as the setting up of a fund in which royalties are deposited for the use of community development. For example, the Rwandese Cabinet

approved a mechanism to share revenue from mining so as to support the development of communities living near the sites (*The New Times* 2016). Another example is that of Newmont Goldcorp. Newmont has set up a community foundation into which 1% net operational profit from its Ahafo South mine in Ghana plus \$1 per oz of gold from Ahafo is deposited (World Bank 2010: 35). Communities then participate through the Ahafo Social Responsibility Forum (ASRF) in order to determine the allocation of community development funds.

Land use conflicts can become particularly intense when the issue of tenure becomes unclear. In some cases, different systems of tenure may overlap (for example, customary tenure versus state ownership); disputes may arise over disagreements concerning surface versus subsoil ownership; and conflict may be ignited when different claims on valuable minerals or hydrocarbons are at stake. Indeed, land acquisition associated with extractive industry investments can further obscure tenure rights, particularly when they are insecure or contested (Cotula 2014). In the case of Liberia, for example, a report for the Government Land Commission suggests that the government has issued concessions to commercial entrepreneurs, communities, and to conservation programs that exceed 50 percent of the country's land area. Much of this land, the report adds, has long been utilised by rural populations, opening up the inevitable likelihood for land disputes and conflict to erupt (Wit 2012), and no amount of financial remedies can be quantified for depriving communities of their land. However, even when mining corporations agree to compensate local communities for land appropriated, or relocate them to different areas, it often cannot adequately make up for losses, particularly when the territory is so closely associated with social identity and a strong cultural or spiritual connection to the land exists (Cotula 2014).

Consequently, financial remedies are limited towards what can be properly assessed and quantified. Loss of land, crops and livestock can be estimated at market value, while loss of lives and polluting the environment are subject to the compensation determined by the courts. However, placing a financial figure on loss of social identity as a result of displacement and separation from ancestral land is a challenge not yet addressed by law nor government policy. This is a unique feature of African local communities whose identity is tied

to their land. In such circumstances financial compensation itself cannot suffice as a remedy for displacement.

Environmental degradation

Environmental degradation caused by mining corporations projects can increase the vulnerability of the poor, exacerbate tensions, and trigger conflict. Such sentiments are confirmed in a study by Franks (et al. 2014), who examined publicly available information concerning 50 different cases of prolonged company-community conflict around mining operations globally and reported that environmental issues were identified as the most common triggers of conflict. There is perhaps no clearer example of the devastation that the environmental impacts of the extractive industry can have on local-level livelihoods than the situation that has unfolded in Nigeria's oil-rich Niger Delta.

Watts (2004: 263) notes: "the consequences of flaring, spillage and waste for Ogoni fisheries and farming have been devastating. Two independent studies completed in 1997 reveal total petroleum hydrocarbons in Ogoni streams at 360 and 680 times the European Community permissible levels." Such ecological damage to farming and fishing-related traditional livelihood structures has, according to Pegg and Zabbey (2013: 391-405), largely been accepted by the government as the legitimate consequences of doing business in the Niger Delta. It has also been a major factor in perpetuating oil-related conflicts for over two decades, first in the form of community protests against oil industry operations; then as the main driver of the petro-violence associated with insurgency and the counter-insurgency responses by state security forces (Watts and Ibaba 2011: 1-19).

In such circumstances, one has to question again the value access to justice has for local communities. Access to justice becomes the palladium for protecting land and environment against further damage. It forces the State under its duty to *respect, protect and fulfil* to compel mining corporations to align their business activities on privately owned land with the principle of public interest. This dichotomy of private and public interest can only be met through company-community consultations. Such consultations are a means of access to justice for local communities. When consultation fails to secure and protect the rights of communities then judicial steps

provide the avenue for the justiciability of rights that have been violated.

Insufficient community consultation and compensation

It is frequently the case that conflict within catchment communities can result from grievances that stem from insufficient compensation for loss of resources, or inadequate consultation with companies and governments. Although many countries have now adopted community development agreements or similar arrangements in their mining laws, companies still often deal directly with central government agencies, bypassing local stakeholders altogether. In cases in which limited community consultation does take place, mining companies may privilege relations with elites or traditional leaders, whose interests can diverge considerably from those of the community (Maconachie et al. 2015).

In such situations, elites may capture supplier contracts, employment opportunities, and other benefits. For example, in the context of the major iron ore investments that have recently taken place in Sierra Leone, Fanthorpe and Gabelle (2013: 72) point out that “companies are not required to secure local landowners’ consent in order to obtain large-scale mining licenses; they merely have to supply licensing authorities with evidence that they have consulted with ‘interested and affected parties’.” The responsibility to consult, they continue, “does not grant communities a right of input into either the terms of mining license agreements or the monitoring of environmental and social management programmes” (Ibid: 73).

Protection against the abject dismissal of community participation, as the affected parties stipulate the conditions in the mining contracts, is, therefore, achieved through access to justice. As a result of the foregoing challenges that adversely impact communities, these communities turn towards justice to secure their rights over their land and environment.

Different avenues for redress available to local communities

There are various types of redress available to communities seeking redress for business-related human rights violations, such as injunctions, damages/compensation, revocation/cancellation of mining licenses, conservatory orders, prohibitory orders as well as criminal sanctions. These remedies can be sought through judicial mechanisms. Non-judicial mechanisms also provide some form of remedies. The present article, however, limits itself to addressing financial remedies (damages/compensation) awarded to communities against multinational corporations and the extent to which access to financial remedies is available, adequate, effective and prompt. Financial remedies may be available through judicial as well as non-judicial approaches.

Communities seeking to use judicial mechanisms to obtain a financial remedy face many political and legal challenges. While those challenges vary from jurisdiction to jurisdiction, there are persistent problems common to many jurisdictions. These include fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for community claims; and a lack of enforcement and political support. These problems have all contributed to a system of domestic law remedies that are “patchy, unpredictable, often ineffective and fragile” (Zerk 2014: 7).

The right to an effective remedy for harm is a core tenet of international human rights law and a key value of the right to have access to justice. The obligations of States with respect to this right have been reflected in the Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework (A/HRC/17/31) in terms of a “State’s duty to protect” against business-related human rights abuses, of which providing access to an effective remedy is an integral part.

Mining corporations often explore and operate near land and property belonging to, or being used by, communities. Mining can negatively affect the local environment, including water and biodiversity, as

well as people's livelihoods (which often depend on the health of the environment or access to land and resources). However, the existing literature on access to financial remedies for communities affected by the operations, policies and projects of corporations in the extractives sector is fairly limited. The Business and Society Exploring Solutions (BASES) website provides online access to the largest collection of materials on grievance mechanisms. This website aims to provide a collaborative workspace for sharing information and learning about how dispute resolution between corporations and society works around the world, but it provides no information on access to financial remedies for communities. A need to close this gap in literature thus arises. Consequently, the next sections respond to answering the question about the extent to which local communities are able to access financial remedies under their right to have access to justice.

Judicial Approach

Access to justice for financial remedies can be sought through judicial as well as non-judicial mechanisms, which are both social tools to regulate society in order to maintain order. Judicial mechanisms lie at the "core of ensuring access to justice" (A/HRC/17/31, Principle 26). Ensuring judicial access to justice is complex and involves issues such as national judicial structures, institutional capacity, the community's access to resources and funding, as well as policy and enforcement constraints. Having overcome any practical barriers, the first legal hurdle for the community is to establish that the relevant court has jurisdiction over the matter and the parties. This has proven challenging in many human rights related claims in which rights-holders attempt to seek a remedy directly against a parent company in its home jurisdiction for the activities of a subsidiary occurring abroad.

Such claims are put forward for a variety of reasons, including barriers to accessing effective remedies from the courts where the harm occurred, and the fact that a parent company may be better placed financially to satisfy a successful claim. Access to justice also requires demonstrating a recognised legal basis for the claim, and the possibility of adequate and appropriate forms of remedy for harm suffered. Claimants in such cases increasingly allege that the parent company has breached a duty of care owed to the rights-holder, or that the corporate veil should be pierced (or disregarded) to enable

the parent company's liability for the activities of its subsidiaries. An examination of selected cases has demonstrated that legal barriers prevent local communities from accessing justice through the courts. What follows next are five cases of communities unsuccessfully accessing financial remedies through judicial mechanisms.

The case of Mali

With the opening of the Sadiola mines in 1996 by *La Société d'Exploitation des Mines d'Or de Sadiola* (SEMOS) for large-scale gold mining, there has been massive destruction of the environment and the livelihood resources of the community in Mali (Tamufor 2005: 8). Women who were originally economically active in farming, gold washing or market gardening became unemployed because of the loss of their lands to the mining company. Skilled labour migrated to work in the mines, which in turn led to a sharp rise in the population, resulting in an overburdening of the already-limited social facilities.

Cyanide and mercury are two toxic substances used to purify the minerals during mining. Its contamination of the groundwater had led in this area to cases of paralysis, blindness and numerous miscarriages (Tamufor 2005: 8). In two villages in the southwestern region of Sadiola in Mali, four out of five women miscarried. The Sadiola health district was originally built to cater for about 450 people. With increased population and spread of diseases, mainly respiratory due to the high level of dust circulation caused by mining activities, the health facilities also became incapable of catering to the needs of the increased population. The communities expressed dissatisfaction over compensation packages of the government and mining companies.

Unfortunately, there is no data on what precisely constituted the compensation packages. The Chief of Farabacouta noted that the rice fields in Sadiola have been partly destroyed by roads and mining activities, hence rendering the activity unprofitable, but this was not taken into consideration during the payment of compensation (Tamufor 2005: 8). In Tabacota conflict arose between the community and the mining company when fourteen cows died as a result of eating cyanide-contaminated food. The company refused to compensate for the loss of the cattle, the reason being that the pipe burst leading to the

cyanide spill occurred long before the cattle were allegedly poisoned (Tamufor 2005: 8).

The administrative authorities were unable to compel the mining company to compensate the community for the cattle loss (Tamufor 2005: 8). There has been no effective framework or institution for dispute resolution. The communities have lost confidence in local authorities that have been mandated to settle disputes. Very little thought was given by decision-makers in Mali to address the conflicts that are inevitable with the introduction of any new project or scheme. Tension between the people and the community and the presence of immigrants from other neighbouring West African countries has made life difficult for the indigenous population. This has created a deep mistrust between the community, the administration and the mining companies.

Further, the law suit that was filed under Société d'Exploitation des Mines d'Or de Sadiola S.A. versus Republic of Mali, ICSID Case No. ARB/01/5 was ruled in favour of the corporation denying the communities compensation. The judgement has not been published online for easy access (italaw 2015).

The case of Zambia

Vedanta Mines took over the Konkola Copper Mines (KCM) of Zambia in 2004. KCM is an integrated operation in Zambia, comprising underground and open pit mines, a leaching plant and smelting and refining facilities. On 6 November 2006, the entire Chingola district was faced with a water supply crisis following pollution of the Kafue River by a spillage of mining effluents from the KCM plant (Tamufor 2005: 8). The two water companies that supply around 75,000 people in Chingola residential areas, Nkana Water and Sewage Company (NWSC) and Mulonga Water and Sewage Company (MWSC), were forced to shut down their plants when the Kafue River turned blue when a pipe delivering slurry from the tailings leach plant at KCM burst, releasing into the water effluents that raised chemical concentrations to 1,000% of acceptable levels of copper, 77,000% of manganese and 10,000% of cobalt (Tamufor 2005).

The result was that residents of Chingola Township were cut off from supplies of freshwater for six days. Some residents of more informal

settlements in the area, such as Hippo Pool Township, who do not have access to piped water, have always drawn their drinking water from the Kafue. In cases where piped water had been cut off, others were forced to go directly to the river (Tamufor 2005: 8). Although the Government attempted to provide water tankers and to discourage people from going to the Kafue, the study by Tamufor (2005) documents that as a result of water scarcity residents continued going to the Kafue (Tamufor 2005).

Consuming water as polluted as that in the Kafue, eating fish from the river, or plants watered with polluted water is likely to have wide-ranging short- and long-term health implications. The chemicals spilled into the river cause lung and heart problems, respiratory diseases and liver and kidney damage. In the short term, a large number of residents are suffering from diarrhoea, eye infections and skin irritations. These are likely to be only the early signs of poisoning that will have long-term impacts. Exposure to manganese can cause “manganism,” a disease of the central nervous system affecting psychic and neurological functions. Brain damage effects in the local population may only show up in future generations.

Despite being responsible for the water crisis in Zambia, Vedanta failed to take corrective or remedial action. It is not without reason that Vedanta has been termed unethical by the world’s second largest sovereign pension fund, operated by the Norwegian government (*BBC News* 2015). In November 2007 the company sold all its shares (worth around US\$13 million) in Vedanta Resources Plc. After nearly two years of research, the fund found out that continuing to invest in the UK company would present “an unacceptable risk of contributing to grossly unethical activities” (*BBC News* 2015). No compensation was paid to the affected communities. In September 2015, a group of 1,826 Zambian villagers filed a lawsuit (Dominic Liswaniso Lungowe & Others versus Vedanta Resources Plc and Konkola Copper Mines Plc, (2016) EWHC 975 (TCC)) against Vedanta in the UK court over the water pollution caused by its subsidiary’s copper mining operations. On 27 May 2016, an English High Court judge ruled that the lawsuit against Vedanta may proceed. In June 2016, the company said that it will appeal the English court’s May decision to allow the lawsuit to proceed, by challenging its jurisdiction (*The Guardian* 2016). This case for financial remedies is yet to be determined. In the meantime, the

affected communities continue to suffer health risks for which they have no finances to meet the rising cost of hospital bills.

The case of Malawi

Under Malawian national laws when the government acquires land rights for public use, the landholder is entitled to compensation for losses suffered. A long-standing principle in many jurisdictions is that compensation should be guided by the objectives of equity and equivalence; many national constitutions provide that the compensation must be fair and adequate. In many instances, financial compensation seems inadequate in relation to the long-term social and economic costs of mining (Catholic Commission for Justice and Peace 2014).

Compensation in government compulsory land acquisition depends on the rights held (Government of Malawi 2013). Generally, in compulsory acquisition: from customary rights holders, compensation is not a legal requirement although most policies require that communities must be resettled. As a result, when such matters go to court, compensation is often discretionary, dependent on the investor or government agency negotiating with the community, and on the community's legal awareness and access to knowledge; from private owners, compensation is given to the owner for ownership interests in the land along with other elements prescribed by law (Tilitonse 2013). Factors taken into account by courts of law when calculating compensation are insubstantial, inadequate and unjust. There are no legal requirements stating conditions of payment of compensation and penalties for breach of conditions and informal tenure holders are not guaranteed compensation.

The case of Kenya

Base Titanium set up its titanium mining project along the coast in Kwale County and to facilitate its project the Government forcibly displaced communities who refused to accept compensation they considered inadequate (Economic Commission for Africa 2013). The Government did not consult the community on the question of compensation and merely imposed its unilateral and arbitrary decision on the communities (Economic Commission for Africa 2013). The

communities filed a law suit against the corporation, which remains unsettled.

This case establishes the failure on the part of the Government that has the duty to *respect, protect and fulfil* human rights to enable access to financial remedies by communities affected by business-related human rights violations. In this case, access to financial remedies by the communities was not only denied by the Government but in unilaterally assessing the compensation payable the Government did not even consider benchmarks within which to establish what would have amounted to adequate compensation (Economic Commission for Africa 2013).

The Mining Act of Kenya, including a clause on financial remedies, states that an owner or occupier of land who is dissatisfied with the compensation offered could refer the matter to court within one month of making the demand for compensation (Mining Act 2016). It also stipulates procedures for the payment of compensation where mineral rights disturb or deprive the owners or lawful occupiers or users of the land or part of the land. In such cases, the person seeking compensation is required to make a demand or claim for compensation to the holder of the mineral right, who should then pay “prompt, adequate and fair compensation” (Mining Act 2016: section 153).

With respect to the Mining Act providing access to financial remedies, it requires the mineral rights holder to deposit a compensation guarantee bond with the Ministry and encourages parties to resolve disputes on compensation amicably through negotiations. Where negotiations fail, parties may refer the dispute to the Cabinet Secretary for determination and further appeal to the High Court where the determination so made is unsatisfactory. A challenge would be where such an owner or occupier is financially incapable of affording legal services to retain the services of a lawyer and pay for court filing fees thereby being unable to access justice.

The case of Tanzania

The case of Tanzania shows the emotive relationship between African communities and land. A study conducted by the Society for International Development (2009) revealed that inadequate compensation awarded to communities that occupied land containing

minerals led to conflicts. Such conflict was exacerbated due to the fact that the community members were first not aware of the criteria applied towards awarding them compensation, and second, that the criteria used were itself not clear. The affected communities were not even involved in the process for determining compensation, which they then deemed unfair (Society for International Development 2009). In terms of compensation, the communities were paid only for the investment or work that they put into the land but not for the land itself. Financial remedies were therefore restricted to what was added onto the land, not the value of the land itself.

Moreover, in accessing judicial avenues to seek financial remedies, the affected communities found the legal system to be extremely difficult and expensive to claim the compensation due to them and this resulted in these communities being awarded compensation that was insignificant and subject to embezzlement by the authorities entrusted to distribute it (Lange 2011). The Tanzanian Mining Act of 2010 provides for compensation to be fair and reasonable and stipulates that disputes on the amount of compensation are to be referred to the Commissioner for resolution and that further appeals must be directed to the High Court. In the case of Kahama Mining Corp. Ltd. versus Maalim Kadau & Others Civil (Case No. 12 of 1995, High Court of Tanzania), a mining corporation sought the eviction of a local community from the area of its operation without proper compensation. This community had been residing within the area from which the corporation sought their eviction since 1975 and despite this the court ordered their eviction without deliberating on how the community was to be financially compensated.

These judicial cases demonstrate the failure by local communities to access justice in seeking a fair compensation against the mining corporation's business-related human rights violations. The seven cases outlined above point to several contributing factors that have restricted their right to access to justice. These can be summarised as: (1) lack of knowledge, support and information on the legal process and the unavailability of legal aid to advance their cases in court; (2) the barriers put up within corporate law make it difficult to sue a subsidiary in a country where rights have been violated; (3) the mining company is pursuing an appeal that lasts for considerable lengths of time; (4) out of court settlements with community leaders

who are enticed by bribes; and (5) the local government siding with mining companies at the disadvantage of the communities.

Non-Judicial Approach

Other than going to court, a number of non-judicial grievance mechanisms are offered by States. These can range from those provided by national human rights institutions, labour tribunals, ombudsmen, and National Contact Points established pursuant to the OECD Guidelines for Multinational Enterprises, to multi-stakeholder initiatives involving States. There are also calls for other mechanisms, not traditionally designed to address violation of rights, to be reformed in order to facilitate access to justice. This has arisen, for example, in the context of the independent accountability mechanisms of development banks, which are often State-based lending institutions or international organisations. These banks have an internal monitoring system to check whether the companies they are financing are operating in observance of human rights.

In January 2016, various organisations cooperated in publishing a report entitled “Glass Half Full? The State of Accountability in Development Finance” (Franks et al. 2014). The report examines several mechanisms against criteria in the United Nations Guiding Principles and proposes adaptations aimed at rendering non-judicial mechanisms accessible to complainants. As part of the obligation to facilitate access to justice, these non-judicial mechanisms have entertained the possibility of creating remedy funds that will compensate local communities directly for the failures of development institutions to properly oversee the impact of finance provided to corporations. Whether these non-judicial mechanisms have proved more effective than judicial measures is a question this section examines.

Defining non-judicial mechanisms

Ruggie (2011: 28) defines non-judicial mechanisms as “any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business related human rights abuse can be raised and remedy can be sought.” If his definition is to be further analysed, three key points must be noted: (1) State involvement

in non-judicial mechanisms is not a condition; (2) human rights violations can be addressed through the non-judicial approach; and (3) the power to grant remedies is also bestowed through the non-judicial approach. According to Ruggie (2011) the only condition is that such non-judicial processes have to be considered as a routine. That is, the mechanism must be available, consistent and be seen as working. It must be an established procedure.

Hill (2010) provided another definition which, if looked together with Ruggie's, gives clarity on what a routinised non-judicial process means. According to Hill (2010: 7), a routinised non-judicial process would mean "a company-supported, locally based and formalised method, pathway or process to prevent and resolve community concerns with, or grievances about, the performance or behavior of a company, its contractors or employees." Hill's definition is informative on two points that help us understand what a routinised non-judicial process means. First, it concerns the formalities and second, it relates to process. The test of routine, therefore, lies in the analysis of these two points. The first point concerning formalities requires that the non-judicial process must meet three criteria: (1) it must be supported by the company; (2) it must be locally based; and (3) it must be a formal process. The second point on process considers the substance of the complaint and the remedies being sought and this entails ideas of how to prevent and resolve community grievances. Hill's definition, however, does not expressly associate dispute resolution under the non-judicial process with remedies. Only Ruggie's definition allows for remedies to be seen as part of the non-judicial process. Hill's definition also does not provide guidance on how to interpret what is meant by a formalised method.

Previous direction on the meaning of a formalised method for non-judicial processes was provided by the International Council on Mining and Metals (ICMM 2009). The ICMM explained that a formalised method meant a "set of processes a company may have in place to deal with local level concerns and grievances." This definition is problematic in that it leaves to the discretion of a company whether or not to have a non-judicial mechanism to resolve community grievances. It limits the non-judicial process to the arbitrary decision-making power of a company in either setting up the formal process or disregarding it. This in itself breaches the right to access to justice

since it fails to express clearly how the non-judicial process relates to a formalised method.

Following from the ICMM definition, that pushed the non-judicial process as a discretionary tool with companies, the International Finance Corporation (IFC 2009) has provided benchmarks with which to assess the non-judicial process as a formalised method. These benchmarks help to strengthen the non-judicial process as an avenue through which the right to gain access to justice can be made available to local communities. The IFC (2009: 4) definition simply provides that the non-judicial approach is “a process for receiving, evaluating, and addressing project-level grievances from affected communities at the level of the company, or project.” The benchmarks to be noted out of this definition equate the non-judicial approach as a formalised method: (1) a company must put in place a system for receiving local community complaints; (2) there must be an established system for evaluating those complaints; and (3) there must be a process through which the received and evaluated complaints are addressed by the company.

These four definitions by Ruggie, Hill, ICMM and the IFC will guide the subsequent analysis on whether the non-judicial process has provided for the right to have access to justice by local communities harmed by business-related human rights violations in the mining sector. It is important to point out that there is no literature that provides evidence-based descriptions and analysis of the historical evolution of access to justice through the non-judicial process for financial remedies for communities affected by the operations, policies and projects of corporations in the extractives sector. What is available is literature on theory, concepts and norms related to understanding the impact of business-related activities on the human rights of local communities but not their right to access justice through financial remedies (see generally: Facing Finance 2018, Ruggie 2011, Hill 2010, Zorilla 2009). Thus, it is not possible to establish a chronological description of the evolution of such non-judicial remedies or attribute the emergence of non-judicial remedies to a particular driver or point in time. However, a number of factors – prior to the formulation of the UN Guiding Principles on Business and Human Rights – are likely to have played a role in driving the growing use of non-judicial remedies. These factors are discussed below in order to evaluate whether they,

as part of the non-judicial process, satisfy the realisation of the right to gain access to justice by the affected local communities.

The advent of Corporate Social Responsibility (CSR)

A series of high-profile cases during the 1980s and 1990s involving major companies such as BP, Union Carbide and Shell (Sheoin and Pearce 2014; Vidal 2010; Pearce 2004) brought to the public eye the risks of large-scale industrial projects in developing countries. On the one hand they revealed how major transnational companies can have a positive impact on development by investing in poor countries, transferring important technologies over borders and offering employment opportunities. On the other, many companies had become powerful transnational actors, some with even larger revenues than the governments of the countries they were operating in. Such companies had the potential to have significant adverse impacts on communities and the environment, such as colluding with government security forces in extra judicial killings, providing revenues that kept kleptocratic governments in power, human rights violations and environmental degradation (Wilson and Blackmore 2013).

These adverse impacts led communities and corporations to champion for corporate social responsibility (CSR) initiatives internally and develop the business case for closer attention to be paid to preventing and managing adverse impacts on communities. In relation to communities, key CSR concerns include how to ensure that a company's operations do not adversely impact the surrounding community; that community members are appropriately consulted and duly compensated for any unavoidable negative impacts, and that the overall net impact on the community is positive (Wilson and Blackmore 2013). CSR reinforces the duty to *respect, protect and fulfil* human rights. It is seen as a non-judicial approach to prevent and remedy any violation of human rights of local communities that could potentially arise as a result of the company's business activities.

In some countries the CSR principle has led to cooperation between companies and communities and affected communities have had their grievances effectively addressed. However, CSR is not an obligation under law and companies that do not provide for CSR measures cannot be held accountable by law to remedy wrongs done to local

communities as part of their social responsibility. The Africa Mining Vision (Bulletin 6) has noted that mining companies do not treat CSR as peripheral to their core business and only promote it in their business plans as a precondition for obtaining a mining license or to secure financing. The definition provided by Hill supports this view adopted by the Africa Mining Vision which shows the discretionary nature of CSR as a non-judicial process to resolve business-related human rights violations of local communities.

The setting up of complaints mechanisms

International Non-Governmental Organisations (NGOs) have called upon international development banks that provide finance for large infrastructure and extractive projects in developing countries to play their part in ensuring effective dispute prevention and resolution for the communities located near the corporation's operations. This led to the creation of the World Bank Inspection Panel, which was the first complaints mechanism established by an international financial institution to address allegations of harm to communities from projects it financed (Clark 1999). Established in 1993, the mechanism focuses only on investigating whether the staff of the World Bank have complied with the Bank's own policies or procedures — though in its most recent evolution it has concluded that strong company-community relations and conflict resolution capacity should be built into World Bank projects from their inception.

The International Finance Corporation also established a complaints mechanism: the Compliance Advisor/Ombudsman (CAO). Unlike the World Bank Inspection Panel, the CAO provided not only for compliance assessments but also for “problem solving,” that is, dialogue-based approaches to addressing complaints from communities. The 2007 revision of its procedures introduced a clearer separation between the problem-solving role and the compliance-assessment role (IFC 2007).

Various regional development or investment banks, such as the European Bank for Reconstruction and Development (EBRD) and the Asian Development Bank (ADB), have followed suit in adopting complaints mechanisms. Other international and national mechanisms related to grievances by communities have since also been established to mediate disputes and/or increase corporate

accountability. Examples include the National Contact Points of the OECD Guidelines for Multinational Enterprises (OECD 2000) and the Canadian Extractive Sector Corporate Social Responsibility Counsellor (FAITC 2013), which both have a mandate to mediate disputes between companies and communities.

All these initiatives have created a fertile ground for companies to develop their own self-managed mechanisms to handle complaints by communities more directly, thereby giving practical effect to the definitions of non-judicial process given by Ruggie (2011) and IFC (2007). Both the IFC and CAO, among others, have required and/or encouraged companies to develop such mechanisms before or during the project, including through offering publicly available guidance materials. In the case of Ghana, the setting up of a complaints mechanism has led to a number of civil society organisations such as WACAM, Third World Network, and CEPIL to work together with local communities in successfully holding mining companies accountable and paying effective and fair financial remedies for breached rights (Kwakewah and Idemudia 2017).

In addition, Rees and Vermijs (2008) have identified six different types of mechanisms to address the setting up of community grievances. Whether or not these have had an impact on access to justice by local communities remains to be tested. Below I will investigate these six types and their impact on the right to have access to justice.

The first of these types of mechanisms is information facilitation, which consists of gathering and disseminating information on grievances, leaving any further action on that information to its end-users. The second is negotiation, consisting of “direct dialogue between the parties to the grievance with the aim of resolving the grievance or dispute through mutual agreement” (Rees and Vermijs 2008: 3). A third is mediation/conciliation, which is similar to negotiation, except that it requires the assistance of an external, neutral facilitator that helps solve the grievance through mutual agreement. This facilitator could take a more or less active and intrusive role in the process. The fourth is arbitration, defined as the “process by which neutral arbitrators selected by the parties to a dispute hear the positions of the parties, conduct some form of questioning or wider investigation and arrive at a judgment of the

course of action to be taken in settling the grievance or dispute, often [but not necessarily], with binding effect on the parties” (Rees and Vermijs 2008: 6). The fifth type of mechanism is investigation, consisting of a process aimed at gathering information and views about the grievance in order to produce an assessment of the facts. And finally, the last is adjudication, which is the formation of a judgment on the rights and wrongs of the parties in a disputed situation, and on the solution needed. The decision drawn from this procedure may be binding to the parties or can lead to a sanction. According to Rees and Vermijs (2008), adjudication differs from arbitration in that the parties are not required to agree on who will adjudicate and does not have a formal process of hearings (Rees and Vermijs 2008).

This article argues that the IFC definition mentioned under the paragraph defining non-judicial mechanisms by Ruggie (2011: 28) embodies well the Rees and Vermijs six-type scheme, in that it sets out a coordinated formalised method for carrying out the non-judicial process. Accordingly, companies have developed different internal mechanisms to deal with community issues on their own in line with the Rees and Vermijs approach. The following is a discussion of four African countries that show the extent to which local communities have been able to access non-judicial remedies over their violated human rights. Nigeria, Zimbabwe, Chad and Cameroon have been relied upon due to the availability of data.

Nigeria

In Nigeria, Chevron introduced the Global Memorandum of Understanding (GMOU 2005). This is an initiative that clusters together the communities on which Chevron’s operations have an impact and deals with their issues in a contract between company and community. However, no compensation has yet been paid to communities adversely affected by the company’s human rights abuses under the GMOU. This company has been sued for 1 billion Naira by the Chairman of Okoyitoru Development Council in the Warri South West local government area of the Delta State in Nigeria over environmental degradation caused by its operations in the community. This case was lodged in court in April 2017 (Nwafor 2017). The GMOU is indicative of types one, two, three and six of the Rees and Vermijs approach to non-judicial mechanisms.

Zimbabwe

In Zimbabwe, the Anglo-American company, one of the world's largest mining companies, with operations in Africa categorises some grievances as localised "housekeeping" issues, which local staff are best placed to manage. These can include complaints associated with dust from trucks, daily blasts and noise pollution and a need to change the timing of operations to be less disruptive for local communities. More serious grievances might relate to land rights, fisheries damage and labour issues. One of the objectives of Anglo American's grievance mechanism is to solve problems to everybody's satisfaction before they get escalated into a court of law (Wilson and Blackmore 2013). This fits within type one, two and three of the Rees and Vermijs approach to non-judicial mechanisms.

Chad and Cameroon

In Chad and Cameroon, ExxonMobil faced the challenge of having to acquire land in a large area where private property is not recognised by the state and a complex land use system that led to multiple individuals having claims on the same piece of land. In order to avoid potential conflicts with the community, ExxonMobil established a multi-party commission that included government officials, village chiefs, traditional authorities, ExxonMobil representatives, and two NGOs selected through a competitive bidding process. The Commission undertook a systematic, village-by-village process of "social closure," (Blanchet n.d.) whereby they reviewed each compensation agreement along the pipeline route, and determined whether it was in compliance with the broader environmental and social management plan. For cases of non-compliance, the commission determined appropriate corrective measures. To promote transparency, final compensation payments took place at public hearings in the affected villages, with one of the NGOs serving the role of "witness" to the process (Blanchet n.d.). The steps employed in resolving the Chad and Cameroon grievances are indicative of types one, two, three, five and six of the Rees and Vermijs approach to non-judicial mechanisms. The affected local communities in Chad and Cameroon were able to effectively access justice and receive financial compensation through the non-judicial approach established by ExxonMobil.

Creating room for stakeholder engagements

The evolution of stakeholder engagement is also an important driver in growing attention being paid to the discourse on access to non-judicial remedies by communities. National governments, international finance institutions and other investors increasingly require or expect that corporations identify, consult and engage with communities to prevent and mitigate negative social, environmental and economic impact to the greatest extent possible, as well as how investments in the community can be most beneficial (Zandvliet and Anderson 2009).

In the last decade many organisations have sprung up to assist companies in this process — both for commercial and non-profit purposes. Leading international institutions have developed public guidance material on stakeholder engagement in emerging markets and conflict-affected areas, including the AA1000 Stakeholder Engagement Standard developed by AccountAbility (2011) and good practice guidance documents developed by IFC (2007) and International Alert (2005). This approach seeks to reinforce the understanding of non-judicial mechanisms as a formalised method towards preventing and remedying human rights violations of local communities by mining companies. A report by the International Bar Association's Human Rights Institute (2013) titled "Tax Abuses, Poverty and Human Rights" has extensively documented the failed approach of stakeholder engagements as a non-judicial approach to resolving the violation of a local community's human rights.

This section has shown that access to financial remedies for communities either through the available judicial or non-judicial channels is neither effective nor prompt. In fact, compensatory relief for communities is dependent on the extent to which mining corporations are willing to pay for their business-related human rights abuses. The existing grievance mechanisms established by these corporations in as much as they call for stakeholder participation in assessing compensation for harm and damage done as a result of their projects is greatly aligned to the corporations policy on how much to compensate, which policy is politically backed by the government. The laws only provide for the normative framework; specifying that compensation must be adequate and effective, without belabouring to set out how to assess adequate and effective compensation. The

fact that access to financial remedies is unregulated leaves room for corporations to engage in improper practices to ensure that minimum compensatory relief is awarded by the corporations' dispute resolution mechanism. This negatively impacts ensuring the sustainable development of the local communities in the long run.

Conclusion and Recommendations

The present study demonstrates that access to justice for business-related human rights violations within the mining sector provides a broad spectrum for local communities to have their grievances addressed but often remain ineffective. The judicial approach is costly, time consuming and often subject to technicalities not understood by local communities. Therefore, non-judicial approaches to solve community grievances are an alternative for engaging directly with mining companies in order to repair damage done to communities, but more work needs to be done to ensure that local communities are not exploited by hegemonic power relations. In addition, non-judicial approaches may not be binding and can result in restricting the extent to which local communities may demand reparation following the violation of their human rights by the mining companies. Therefore, based on the foregoing discussions, this article concludes that non-judicial approaches have more potential to secure the right to gain access to justice than the judicial process. However, a set of principles needs to be developed to facilitate this.

Accordingly, the following seven principles can be recommended: (1) the principle of legitimacy that enables trust from the local communities for whose use the non-judicial approaches are intended and ensures accountability for the fair conduct of grievance processes; (2) the principle of accessibility, being known to all affected local communities for whose use the non-judicial approaches are intended, providing adequate assistance to those who may face particular barriers to access justice; (3) the principle of predictability providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available as well as means of monitoring implementation; (4) the principle of equitability seeking to ensure that affected local communities have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and

respectful terms; (5) the principle of transparency keeping the local communities to a grievance informed about its progress and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake; (6) the principle of rights compatibility ensuring that outcomes and remedies accord with internationally recognised human rights; and (7) the principle of dialogue consulting the local communities for whose use the non-judicial approaches are intended about their design and performance and focusing on dialogue as the means to address and resolve grievances.

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